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In The

Supreme Court of the United States

October Term, 1953

No. 436

Drew Pearson and American Broadcasting Company, Inc., a corporation, *Petitioners,*

v.

Mary G. Gariepy, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 15A-21A) is reported at 104 F. Supp. 681. The opinion of the Court of Appeals for the District of Columbia Circuit and the dissenting opinion (R. 23-25) are reported at 207 F. 2d 15, 17.

Jurisdiction

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 26). An order denying a petition for rehearing was entered on July 28, 1953 (R. 38). The

jurisdiction of this Court has been invoked under 28 U.S.C. § 1254.

Question Presented

The question is whether petitioners' broadcasts, which substantially stated that respondent while married permitted her affections to be alienated by a priest in such manner that respondent's husband demanded and the priest paid to him $68,000 on account of the alienation, can reasonably be understood in a defamatory sense by the ordinary hearer, and therefore presented a question for the jury.

Statute Involved

D. C. Code (1940 Ed. and 1951 Ed.), Title 22, Sec. 2304 provides:

> "Whoever wrongfully accuses any woman of unchastity shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or both, and shall also be liable to a civil action for damages by the party injured. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 818.)"[1]

Supplemental Statement

The charge that respondent's affections had been alienated by Fr. Coughlin was false. Respondent had never even been in the presence of Fr. Coughlin (other than as a member of a public congregation while he was conducting religious services) except once, when she consulted him professionally for a few minutes relative to her domestic problems (Tr. 329-330). This consultation took place in Fr. Coughlin's office, within view, though out of hearing, of several office employees (Tr. 80). Peti-

[1] A statute of Michigan, where plaintiff, Fr. Coughlin and Dr. Bernard F. Gariepy all resided, is substantially similar. Mich. Stat. Ann. Sec. 27.1370.

tioners' statement that Fr. Coughlin was respondent's parish priest (Pet. 3) is incorrect (Tr. 42-43).

Since September, 1943, respondent has lived in Detroit, Michigan, and there engaged in her profession as an anesthetist. Until petitioners' broadcasts she enjoyed a good reputation (R. 3A).

Petitioner's broadcasts were made on January 30, 1949 and February 6, 1949 (R. 3A, 4A, 8A), approximately nine months before commencement of Dr. Bernard F. Gariepy's criminal trial on October 28, 1949. Petitioners' statements that at Dr. Gariepy's criminal trial "one of his defenses was the same as reported by petitioner Drew Pearson" (Pet. 5, 6) is inaccurate. At that trial it was the United States, not Dr. Gariepy, which proved the false statements made respecting the alienation of respondent's affections and the large sum allegedly paid on account thereof. *Gariepy v. United States,* 189 F. 2d 459, 463 (6th Cir. 1951). At Dr. Gariepy's criminal trial, both respondent and Fr. Coughlin had the opportunity to take the stand and deny the libel, which they did (Tr., *United States v. Bernard F. Gariepy,* D.C.E.D. Mich. No. 30771, pp. 1261, 1276), and the trial judge characterized the libel as a despicable lie (Ibid., Proceedings of Dec. 15, 1949). Cf. *Gariepy v. United States,* 189 F. 2d 459, 463 (6th Cir. 1951). But as noted, this opportunity did not come until about nine months after petitioners' broadcasts.

Respondent suffered special as well as general damages. Respondent's young son suffered such abuse and physical mistreatment by neighborhood children as a result of the broadcasts, as to necessitate his being sent by respondent away from her home to a boarding school (R. 6A). In the original record which petitioners have caused to be lodged in this Court are copies of sensational newspaper articles about the broadcasts which

assume that petitioners had charged unchastity against respondent (Tr. 318-324).

The complaint is in two counts. The first count is grounded on common law libel. The second count charges that the acts of the defendants were in specific violation of D.C. Code (1940 Ed., and 1951 Ed.), Title 22, Sec. 2304 (R. 7A).

ARGUMENT

The Petition for Certiorari Is Insubstantial

I

No Constitutional Issue Is Involved

Petitioners in their petition for certiorari attempt to raise, for the first time during this long litigation, a claim that the case involves issues concerning freedom of speech and press protected by the First Amendment. That their attempt is afterthought and insubstantial appears from these facts:

(i) Petitioners in their motion for summary judgment in the District Court urged as a second ground, a claim that the broadcasts were privileged as a fair report of an official investigation (R. 9A, 12A, 13A, 14A). The District Court rejected this claim (R. 18A; 104 F. Supp. at 683).

(ii) At no time in the Court of Appeals, not even in their petition for rehearing (R. 28-37), did petitioners make a claim of privilege in any form, let alone as a constitutional issue.

(iii) Now, in their petition for certiorari, petitioners bring forth their rejected and abandoned claim of privilege, and attempt for the first time to inflate it into constitutional proportions.

The issue petitioners now attempt to raise is insubstantial. The District Court rightly rejected their claim of privilege; the claimed privilege is non-existent. *Pittsburgh Courier Pub. Co. v. Lubore,* 200 F. 2d 355 (D.C. Cir. 1952). The utmost regard for the First Amendment's guarantees has never been thought to exculpate a libeler from liability for his libel. *Cantwell v. Connecticut,* 310 U.S. 296, 309-310 (1940); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Sweeney v. Schenectady Union Pub. Co.,* 122 F. 2d 288, 291 (2d Cir. 1941), affirmed 316 U.S. 642 (1942); *Caldwell v. Crowell-Collier Pub. Co.,* 161 F. 2d 333, 336 (5th Cir. 1947), cert. denied 332 U.S. 766 (1947). As stated for the unanimous Court in the *Chaplinsky* case:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . ." (315 U.S. at 571-572).

Petitioners' protestations as to the desirability of exposing tax delinquencies (Pet. 13) are not pertinent. Disclosure when "The Justice Department plans to prosecute . . . anyway", scarcely could have the salutary effect petitioners impliedly claim for such revelations. The exposure of such irregularities, even if laudable under other circumstances, in no way necessitates or justifies a sensational sexual charge against a person in no way involved in the tax transactions. Moreover, even assuming *arguendo* that the conditional privilege claimed by petitioners did exist, respondent has pleaded actual

malice (R. 5A), and nothing in the record demonstrates that summary judgment might be warranted on that issue. Indeed, respondent's interrogatories to petitioner Pearson, to show that he never inquired of respondent or Fr. Coughlin prior to the broadcasts concerning Pearson's charge against them (Tr. 136-138), have not yet been answered by petitioner Pearson (Docket Entries, Tr. 348-352).

II

The Decision Below Is Clearly Correct

Petitioners' broadcasts were in substance a statement that respondent while married permitted her affections to be alienated by Fr. Coughlin, in such a way that her former husband demanded and Fr. Coughlin was willing to pay and did in fact pay $68,000 as compensation for the wrong. The Court of Appeals was clearly correct in holding that the broadcasts might reasonably be taken by a jury to defame respondent.[2]

Meyerson v. Hurlbut, 68 App. D.C. 360, 362, 98 F. 2d 232, 234 (1938), cert. denied 305 U.S. 610.
Peck v. Tribune Co., 214 U.S. 185 (1909).
Washington Post Company v. Chaloner, 250 U.S. 290, 293-294 (1919).
Rovira v. Boget, 240 N.Y. 314, 148 N.E. 534 (1925).
King v. Northeastern Pub. Co., 294 Mass. 369, 2 N.E. 2d 486 (1936).

Petitioners' attempts to establish a conflict between the decision below and *Phillips v. Union Indemnity Co.,* 28 F. 2d 701 (4th Cir. 1928), because the opinion below does not in all instances where it uses the word "might" follow it up with the words "reasonably be understood" (Pet.

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[2] In Michigan, during the relevant period of time (1938-1943), and since, civil causes of action for alienation of affections, criminal conversation, etc. (with certain limitations not relevant here) had been abolished, and it was a crime to "cause, induce, or procure" any person to settle or compromise such a claim. (Mich. Stat. Ann. Sec. 25.191-25.197).

17-22), seem to us fatuous. Clearly the Court of Appeals held that the broadcasts *might reasonably* be taken by a jury to be defamatory of respondent (R. 25; 207 F. 2d at 16):

> "Therefore the question for the court in the present case was whether appellees' broadcasts *might reasonably* be understood as implying that appellant was an unchaste wife." (Italics added.)

Petitioners' final claim, which apparently is that an adequate allegation of special damages is a jurisdictional requisite here and that respondent's allegation is not adequate (Pet. 24-25), results from sheer semantic confusion. Petitioners confuse the two senses in which courts use the expression "libelous *per se*". In one sense this expresssion means that the words uttered are libelous on their face as a matter of law; in another sense, that the words uttered—because written or broadcast from a manuscript or, although oral, within certain categories of defamation—are actionable without proof of special damages. *Prosser on Torts,* 1941, 790, 797. The Court of Appeals, in holding that the broadcasts present a jury question, holds that they are not "libelous *per se*" in the former sense. But they clearly are in the latter sense. It is conceded that the broadcasts were read from a prepared manuscript (R. 8A, 11A-12A). It has never been disputed that, if the broadcasts were defamatory, they were libelous, not merely slanderous. *Hartmann v. Winchell,* 296 N.Y. 296, 73 N.E. 2d 30 (1947). Libel does not require allegation or proof of special damages. Thus an allegation of special damages is not necessary to sustain the complaint. Moreover, respondent's allegation of special damages is clearly sufficient.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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